

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

06/21/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000769

FILED: _____

STATE OF ARIZONA

ROGER KEVIN HAYS

v.

REBECCA PARRY BAUDOIN

GEORGE E MUELLER

DISPOSITION CLERK-CSC
FINANCIAL SERVICES-CCC
MESA CITY COURT
REMAND DESK CR-CCC

MINUTE ENTRY

MESA CITY COURT

Cit. No. 2001009482

Charge: EXTREME DUI

DOB: 06/26/74

DOC: 02/03/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since the time of oral argument on May 22, 2002. This Court has considered and reviewed the record of the proceedings from the Mesa City Court, the argument and Memoranda submitted by counsel.

Appellant, Rebecca Parry Baudoin, was charged with three crimes: Count 1, Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); Count 2, Driving with a Blood Alcohol Content of .10 or Greater, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and Count 3, Driving with a Blood Alcohol Content of .18 or Greater (Extreme DUI)(this charge was added by long-form complaint), also a class 1 misdemeanor, in violation of A.R.S. Section 28-1382. These crimes were alleged to have occurred on February 3, 2001. Appellant entered guilty pleas to Counts 1 and 2, and then moved to dismiss Count 3 (the Extreme DUI charge) on the basis that further prosecution constituted double jeopardy. The trial court denied this motion. Appellant proceeded to trial on the charge of Extreme DUI and was found guilty. Appellant has filed a timely Notice of Appeal in this case.

The only issue presented on appeal is whether the trial court abused its discretion and erred in denying Appellant's Motion to Dismiss. Appellant contends that the charges were multiplicitous and that the crime in Count 2 of Driving with a Blood Alcohol Content in excess of .10 [A.R.S. Section 28-1381(A)(2)] is a lesser included offense of the crime of Extreme DUI. Appellant contends that her conviction of Count 3, Extreme DUI must be vacated. All of the issues raised by Appellant are questions of law which must be reviewed *de novo* by this Court.¹

The double jeopardy clauses in the United States and Arizona Constitutions prohibit conviction for an offense and its lesser included offense.² Appellee contends that the crime of Driving with a Blood Alcohol Content Greater than .10 or more

¹ *State v. Welch*, 198 Ariz. 554, 12 P.3d 229 (App. 2000).

² *Id.*

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[A.R.S. Section 28-1381(A)(2)] is not a lesser offense of Extreme DUI. However, Appellee's arguments must fail when one considers the elements of each offense. The elements for each crime are identical with the exception that the crime of Extreme DUI requires an additional element of having a blood alcohol content greater than .18. The test for a lesser included offense was summarized by Judge Erlich in State v. Welch,³ as:

An offense is a lesser included offense if it is composed solely of some, but not all, of the elements of the greater offense so that it is impossible to commit the greater offense without also committing the lesser. Put another way, the greater offense contains each element of the lesser offense plus one or more elements not found in the lesser (citations omitted).⁴

When two convictions are based on one act, and one is the lesser included offense of the other, the lesser conviction must be vacated.⁵

This Court, therefore, concludes, as did the Court of Appeals in State v. Welch⁶, that vacating the conviction of the lesser included offense is the appropriate and correct remedy in this case. Naturally, Appellant argues that Count 3, Extreme DUI, should be dismissed. In fact, Appellant did not appeal the judgment and sentence for Count 2 (because of her guilty plea). However, this Court will not be maneuvered into vacating the greater charge as it possesses the authority to correct and dismiss charges in cases properly before this court.

³ Id., 198 Ariz. at 556, 12 P.3d at 231.

⁴ Id., citing State v. Cisneroz, 190 Ariz. 315, 317, 947 P.2d 889.891 (App.1997).

⁵ Id.; State v. Chabolla-Hinojosa, 192 Ariz. 360, 965 P.2d 94 (App.1998); State v. Jones, 185 Ariz. 403, 916 P.2d 1119 (App.1995).

⁶ Supra.

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Appellant also contends that the trial court erred in denying Appellant's Rule 20 Motion for Judgment of Acquittal because there was no evidence of the qualifications of the person who withdrew Appellant's blood. Appellant contends that adequate foundation for the results of the blood draw were not provided and, finally, that Appellant was denied her right of confrontation when the State failed to call the phlebotomist who withdrew her blood.

Contrary to Appellant's assertions, testimony was provided to the jury and trial judge that the Mesa Police Department guidelines for withdrawing blood samples were followed by the phlebotomist who withdrew Appellant's blood. Officer Ybarra testified that he witnessed the withdrawal of blood and that the phlebotomist followed the department's guidelines. It is important to note that Appellant does not contend that the blood was drawn improperly, or that physical harm was caused to Appellant during the blood draw, or that the blood was contaminated in some manner. The only issue presented is whether the phlebotomist was qualified. The police officer's observations of the withdrawal procedures clearly provided appropriate foundation for the trial judge to conclude that the phlebotomist was indeed qualified. Therefore, this Court concludes that the trial judge did not err in denying Appellant's Rule 20 Motion for Judgment of Acquittal and overruling Appellant's objections to the qualifications of the phlebotomist.

IT IS THEREFORE ORDERED vacating Appellant's conviction for the crime of Count 2, Driving With a Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2).

IT IS FURTHER ORDERED affirming Appellant's other convictions and sentences.

IT IS FURTHER ORDERED remanding this matter back to the Mesa City Court with instructions to vacate Appellant's

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conviction for Count 2, and for all further and future
proceedings in this case.

Date: June 21, 2002

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT